JD-44-13
Grand Rapids, MI

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

HOPE NETWORK BEHAVIORAL
HEALTH SERVICES, a wholly owned
subsidiary of HOPE NETWORK

Respondent

and Case 07–CA–094365

LOCAL 459, OFFICE AND PROFESSIONAL
EMPLOYEES INTERNATIONAL UNION, AFL–CIO

Charging Union

Sarah Pring Karpinen, for the General Counsel.
James R. Stadler and *Nicole M. Paterson, Esqs.,*
(Clark Hill), of Grand Rapids, Michigan,
for the Respondent.
Tinamarie Pappas, of Ann Arbor, Michigan,
for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. This case was tried in Grand Rapids, Michigan, on May 21, 2013. Local 459, Office and Professional Employees International Union, AFL–CIO (the Union), filed the charge on December 6, 2012,[1] and the General Counsel issued the complaint on February 28, 2013. The complaint alleges that Hope Network Behavioral Health Services, a wholly owned subsidiary of Hope Network (the Company) violated Section 8(a)(5) and (1) by: (1) changing the health insurance benefits of unit employees without affording the Union a meaningful opportunity to bargain over the change and the effects of the

[1] All dates are in 2012, unless otherwise indicated.

change; and (2) failing to provide and/or unreasonably delaying in providing information requested by the Union necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the unit. The Company denies the material allegations and contends that the collective-bargaining agreement (CBA) permitted it to unilaterally change health insurance benefits after the CBA expired.[2] As to the information request, the Company contends that was either irrelevant to the bargaining or did not exist.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Company, and Charging Union, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Company, a nonprofit corporation, provides behavioral and mental health services at its office and place of business in Grand Rapids, Michigan, where it annually derives gross revenues in excess of $250,000, and purchases and receives goods and materials valued in excess of $5000 directly from points outside the State of Michigan. The Company admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Parties

The Company operates facilities providing behavioral and mental health services, including comprehensive assessments, intensive treatment, a therapeutic living environment, personal care, and individualized case management to disabled, disadvantaged, and elderly individuals. The Union represents the Company's office, support, and paraprofessional staff.

Since 2009, the Company has recognized the Union as the exclusive collective-bargaining representative of the following employees as a bargaining unit (unit employees) within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time advanced Kalamazoo crisis specialists, advanced residential inspectors, cooks, day program instructors, dietary aides, grounds maintenance technicians, health and activity coordinators, housekeepers, Kalamazoo crisis stabilization specialists, Kalamazoo dietary coordinators, Kalamazoo elderly program residential care staff, lead cooks, licensed practical nurses (LPNs), maintenance technicians and flooring and tile specialists, medical assistants, Muskegon residential care

[2] The Company initially asserted that the Union, based upon past practice, waived its right to bargain over health care changes. It did not, however, pursue that defense at the trial or in its brief.

> staff, overnight relief, painters, residential instructors, and transitional health specialists; but excluding the following: on call employees (Status 9), temporary employees, per diem employees, contract employees, administrative employees, clerical employees, managerial employees, confidential employees, consumer employees, and supervisors (Assistant Program Managers, Program Managers, Program Directors, Resident Managers, Resident Assistants, Nursing Supervisor–RNs, Program/Nursing Manager, Shift Supervisors–LPN, Director of Dietary Services, Program/Activities Manager, and Lead Residential Instructors), professional employees (Program Nurse–RNs, Kalamazoo Crisis RNs, Case Managers, Behavioral Specialists, Therapists) and guards as defined in the Act.

This recognition has been embodied in successive collective-bargaining agreements, the most recent of which was in effect from November 1, 2009, through April 30, 2011.[3]

B. The Expired Collective-Bargaining Agreement

Since the 2009–2011 CBA expired, the parties have not agreed to a successor agreement. The terms of that agreement, for the most part, continue in effect pending a successor agreement. At issue are several CBA provisions. Article 3 refers to the Company's management rights and the joint labor-management committee:

> Section 1. Except as expressly modified or restricted by a specific Agreement provision, the [Company] retains the sole and exclusive right and prerogative to manage and operate all aspects and elements of the [Company's] business.
>
> The [Company's] failure to exercise any right, function or prerogative which it retains, or the [Company's] exercise of such right, function or prerogative in a particular manner, will not be considered nor will it constitute any waiver or limitation of the [Company's] retained rights hereunder, nor will it preclude or restrict the [Company] from the later exercise of such right, function or prerogative in a different manner not in conflict with an express provision of this Agreement.
>
> Interpretive Statement: The parties have agreed to amend Article 3, Section 1 during the 2006 collective bargaining negotiations. The parties acknowledge that deleting the specific management rights provisions in Section 1 A, B, C and E of the 4/1/03 3/31/06 collective bargaining agreement do not enhance or diminish the [Company's] rights. The parties agrees that the rights that the [Company] previously maintained in Section 1 A, B, C and E are included in the new general language in Article 3.

Article 52, which provides for health, dental, and vision insurance coverage, contained a "me-too" waiver provision and states, in pertinent part:

[3] GC Exh. 2.

> [T]he health, dental and vision coverage shall change to the insurance plans implemented by [the Company] on October 1, 2009. Union specifically waives the right to bargain over any changes made to the insurance plans during the term of the collective bargaining agreement and [the Company] agrees to give bargaining unit members the same health, dental and vision insurance it gives to other [Company] employees.[4]

Article 60 provides for the interpretation and construction of the agreement in the event of any ambiguity:

> The parties agree that this Agreement and each of its provisions has been the product of extensive negotiations, and that in the event any provision of this Agreement is deemed to be ambiguous or is otherwise subject to interpretation or construction, it will not be presumptively construed in favor of or against either party.

C. The Company's Previous Changes to Health Insurance Coverage

The collective-bargaining relationship between the parties indicates that the Union contested unilateral changes to insurance benefits by the Company. In 2007, the Union filed charges after the Company unilaterally changed health insurance carriers and plans; an arbitrator ruled in favor of the Union and the Company reinstated the insurance plans. In 2008, the Company changed insurance plans after that contract expired and the Union filed charges. The parties settled that dispute prior to an unfair labor practice hearing by agreeing to a new contract. At the time, the Company's representatives recognized that any changes to employee insurance coverage would require bargaining after the contract expired. On October 1, 2010, however, during the course of the 2009–2011 CBA, the Company implemented unilateral changes to health insurance coverage for all employees, including unit employees, pursuant to Article 52.[5]

D. Bargaining over a Successor Agreement

The 2009–2011 CBA expired on April 30, 2011. However, bargaining for a successor contract began in March 2011. The Company's bargaining team was led by its general counsel, Allison Reuter; the Union was represented by Joseph Marutiak. The Union made several proposals.[6] On August 11, 2011, Reuter informed Marutiak of the Company's intention to make unilateral changes to health insurance coverage pursuant to Article 52 of the expired CBA:

> According to the me-too provision in the CBA, we have the right to determine the insurance coverage. Open enrollment must go forward, so we will not be retracting any changes. Let's discuss further on a conference call. I'll be out next week, so Lisa will schedule something for the following week.[7]

[4] Id., p. 60.

[5] The Company's unilateral change to health care during the term of the CBA in 2010 is not disputed. (Tr. 20–21.)

[6] GC Exh. 6-7.

[7] GC Exh. 3.

Marutiak responded on August 24, 2011, prior to their meeting scheduled for the following day, and cited Board cases supporting the Union's position that the "me-too" provision was no longer in effect. On September 1, 2011, Reuter rejected Marutiak's legal analysis, noted that an impasse had not been declared and the terms and conditions of the expired CBA continued in effect, and insisted that the Company was obligated to "offer Union employees the same health care as non-union [Company] employees." On September 5, 2011, Marutiak insisted that the waiver based on the "me-too" provision expired along with the CBA, thus making the unilateral changes in health care plans a violation. On September 6, 2011, Tinamarie Pappas, the Union counsel, reinforced Marutiak's contention that the Union's waiver of bargaining rights ended with the CBA's expiration. On September 8, 2011, Reuter agreed to postpone the changes until the parties reached impasse, but sought assurance from Marutiak that such action would not result in charges being filed. On September 9, 2011, Marutiak assured Reuter that the Union would not file an unfair labor practice charge if the Company did not change the health insurance benefits of unit members.[8]

Bargaining resumed on March 14. At that meeting, the Company provided the Union with its "Last Best Final Offer" containing two options.[9] Option A's economic proposals included a 3-percent wage increase in steps, an annual wage reopener, the Union's proposed wage progression schedule of November 7, 2011, and no Gainshare. Option B's economic proposals differed only to the extent that unit employees would participate in Gainshare. The Company also sought to include the "me-too" provision from the expired CBA.[10] The Union's proposal referred to its wage scale proposal of November 22, 2011, a 1-percent annual wage bonus payment, a wage progression schedule increase of 1-percent, an annual wage reopener, Gainshare, proposed a change to "Article 52 Health Care." In addition, the Union's proposal removed the me-too waiver provision.[11]

At the parties next bargaining session on April 10, the Union submitted "concepts" for discussion. The Union offered to accept the nonunion healthcare plan for unit employees if the Company agreed to consider a wage reopener.[12]

During the midst of bargaining, the Company addressed renewal issues presented by Priority Health, one of its incumbent health insurance carriers. On May 31, the Company's human resources director, Lisa Green, asked HUB International, its insurance broker, for documentation of the Priority Health increase and the rate increase for the Blue Care Network plan that the union employees currently had. The Company's decision, after reviewing its options for health insurance coverage for Unit employees, was "total replacement" of their health plants "into the current non-union plan designs."[13]

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[8] GC Exh. 3, pp. 1–7.

[9] Jeffrey Fleming succeeded Joseph Marutiak as the Union's representative on March 14, 2012. (Tr. 36.)

[10] GC Exh. 5.

[11] GC Exh. 6.

[12] GC Exh. 7.

[13] GC Exh. 32.

On June 1, Lisa Greene, the Company's human resources director, provided the Union with three options for renewal rates "received from our current carriers." The email stated, in pertinent part:

> Because Priority Health's renewal rate increase is very high, (31%), we will not be able to continue to utilize their services.[14] When we meet, we can share our loss ratio history. Because of the change, I have included a communication from Priority Health (see below).
>
> Once you have had a chance to review the information, please forward possible dates and times.
>
> Email String from Laurie at Priority:
>
> > Syd—I verified with Senior Management that we would not be able to facilitate union only. Sorry![15]

Essentially, the Company adopted HUB's recommendation to eliminate Priority Health completely and replace it with a single Blue Care Network plan for all Company employees, or two unit employee plans—"BHS Union Only—All to BCN Design" and "BHS Union."[16]

At the Union's request, the Company provided it with renewal rates from insurance carriers at the next bargaining session on June 20.[17] The attachments included optional union and nonunion plans; there was no mention that all the rates must be the same.[18] At that meeting, the Company also brought in representatives from Priority Health to explain that they would not continue to provide insurance coverage for unit members only.[19]

On June 21, in response to an email from Lola McLincha, the Company's vice president for talent management, about whether the Company would "really save 70k," HUB stated that the Company would save significantly by using the same contribution levels for the Union as in

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[14] McLincha insisted that it was not the Company, but rather, Priority Health who decided not to renew its health care coverage with the Company. She based this assertion on the belief that Priority Health's quote of a 31-percent premium increase was really a "walkaway" price and that it had no intention of renewing coverage. (Tr. 256–261.) I did not credit such testimony, as it was based on alleged uncorroborated hearsay statements by Priority Health representatives and contradicted by the documentary evidence.

[15] Although Greene's email alluded to an "Email String from Laurie at Priority, no such email was attached, indicating the incompleteness and selective nature of the information provided to the Union. (GC Exh. 8.)

[16] Id., pp. 2–8.

[17] Fleming provided detailed, credible testimony about the discussions of this meeting without relying on notes. He was a fairly credible witness. (GC Exh. 8.)

[18] Reuter conceded on cross-examination that there was no mention in her Board affidavits of a total replacement plan.

[19] Fleming's testimony regarding Priority Health's position was not refuted. (Tr. 49.)

the nonunion plan.[20] On June 22, HUB sent the Company an email stating that it would achieve a $34,340 annual premium savings by consolidating all employees into a single health care plan with Blue Care Network.[21]

On June 26, Reuter emailed Fleming the Company's counterproposal, including insurance coverage options with employee premium rates based on "total replacement."[22] The proposed rates represented 25-percent increases of $7.19 for full-time employee family coverage for the core plan and an increase $45.55 for the Blue Care Network buy-up plan.[23]

Fleming objected to the proposed premium increases at the next bargaining session on July 6. McLincha replied that she would discuss the premium rates with "higher-ups." The Union also expressed concerns about other proposed changes to the healthcare plan, which included requiring employees to pay their deductibles before they would be eligible for coverage on certain items such as MRIs and emergency room visits.[24] The Company also presented the Union with a new proposal at the July 6 meeting, including an attendance bonus.[25]

The Union submitted a counterproposal on July 9, notably continuing to oppose the "me-too" waiver provision regarding health care in a new CBA. The parties merely discussed the proposal.[26] On July 17, the Company provided a counteroffer which continued to include the me-too waiver provision, but added two more options—Option A, which included an attendance bonus, and Option B, which included a signing bonus.[27]

The next meeting occurred on August 3. The Company provided a revised proposal for premium contributions by unit employees. The figures presented called for even larger increases in the biweekly contributions from employees. The new proposal called for employees to pay 31.35-percent of their health care premiums, significantly more than the initial 25-percent proposed by the Company.[28] The family rates increased for a full-time employee from $95 for the core plan and $123 for the buy-up plan, to $127.74 for the core plan and $194.10 for the family plan, to be paid on a biweekly basis.[29] The Union asserted the Company was engaging in regressive bargaining because the proposed employee health care contributions presented earlier at the meeting were higher than initially stated. The

[20] GC Exh. 36.
[21] GC Exh. 33.
[22] GC Exh. 9.
[23] McLincha conceded that the Company never asked Blue Care Network (BCN) whether unit employees could be covered a separate plan from nonunit employees. She and Reuter also testified that the decision regarding unit employee's benefits and their portion of premium costs was made by the Company without consulting BCN. (GC Exh. 10; Tr. 193, 266–267.)
[24] McLincha did not refute Fleming's credible testimony regarding this meeting. (Tr. 51–54.)
[25] GC Exh. 11.
[26] GC Exh. 12.
[27] GC Exh. 13.
[28] McLincha's proposal contribution rates reiterated amounts suggested to her by HUB, Hope Network's insurance broker, on July 24. (GC Exh. 34.)
[29] GC Exh. 14.

Company denied that assertion, noting that it had informed the Union that the numbers were not final. Fleming asked if there was any cap in place in case of future premium increases. The Company was unable to provide that assurance. Nevertheless, the Union presented a verbal proposal that included phasing in premium increases, a wage reopener, and a joint compensation task force to review wage rates.[30]

On August 8, Reuter responded to the Union's August 3 proposal by denying that a "final number of 31.25% versus 25% is regressive." She added that Priority Health refused to quote insurance renewal rates, would not provide a self-funded option and attached an August 5 letter from Priority Health stating that it was unable to provide separate coverage to unit employees. In Reuter's letter, she states that the Company considered the Union's proposal to phase in premium increases, but denied it due to costs involved. Reuter concluded by noting that "open enrollment begins this month (August 20). We will have to make a decision on health care very soon."[31]

At the next bargaining session on August 15, the Union responded with another proposal and inquired as to the status of open enrollment for unit employees. Reuter explained that insurance coverage options were still under consideration and stated that the Company's proposal would follow shortly thereafter.[32]

E. The Company Moves Forward With Health Care Changes

On August 22, Fleming emailed Reuter and asked for a response. McLincha responded on August 23 that "[o]pen enrollment is now with the last day of coverage [September] 30. New plan year begins [October] 1. Let me know if you have further questions." Fleming responded a short while later that the parties "discussed at bargaining that open enrollment was on hold for the Union members while we continued to move towards a settlement."[33] McLincha responded on August 24, stating, in pertinent part:

> We have a very small window to work with here. Priority Health is terminating its contract with Hope effective September 31, 2012. We have to communicate with the employees regarding what benefits they will have under BCN. . . . We have been very transparent with all information, costs, reasons, and strategy around health care. Priority Health has issued two letters as well as attended a negotiation meeting at the union's request to explain that they will not cover [the Company]. . . . We have differing opinions regarding the recall of the last negotiation meeting that was held on August 16, 2012.[34] You are recalling that we were placing open enrollment on hold and

[30] The Union called its proposal a "concept." (GC Exh. 16; Tr. 67–69.)

[31] GC Exh. 15; R. Exh. 5.

[32] GC Exh. 17.

[33] GC Exh. 18, p. 4.

[34] I credit the rebuttal testimony of Fleming, who attended all bargaining sessions, that no Company representative ever told him that there was only one option available to unit employees—the total replacement cost. (Tr. 275–277.)

> representatives of [the Company] do not recall the same agreement. Unfortunately, I was not at the last meeting. . . . [The Company] will go forward with open enrollment meetings. We will continue to negotiate and consider the last proposal but the information must be presented now. . . .[35]

Fleming responded almost immediately, insisting that the Union "had been told we would receive a proposal shortly after our last bargaining session. To date we have not received it." He concluded by asking, "What exactly will management be unilaterally implementing? What will employees' benefits levels and premium copays be for the BCN plans?" McLincha confirmed a few minutes later that the Company would be implementing the "BCN benefit levels and premium copays that we shared with you," but was open to Fleming's suggestion as to how the "sign up the employees by" September 13.[36]

In an August 28 email to employees, the Company implemented the aforementioned health insurance changes by distributing a revised employee benefits guide to all employees. The Union was notified of this action on September 12 and, upon request, the Company provided Fleming with a copy of the employee benefits handbook containing the changes.[37]

On September 7, Reuter emailed Fleming regarding the continuation of bargaining for a successor agreement and addressed the Union's intention to file unfair labor practice charges regarding the Company's implementation of the health insurance changes. She disputed the contention that the Company's unilateral change was unlawful, as it was based on the me-too waiver provision and, thus, a continuation of the status quo, citing a recent decision, *E. I. DuPont de Nemours & Co. v. NLRB,* 682 F.3d 65 (DC Cir. 2012). Fleming responded that he disagreed and proposed continued bargaining.[38]

On September 18, the parties met and the Company made proposals with significant concessions. The proposal included a change to Article 52 extending the waiver provision permitting the Company to make unilateral changes to unit employees' health care coverage from the term of the CBA to also include the period after its expiration.[39] The Company also proposed increased wage rates for new employees, but reduced wages of the more senior employees.[40]

Both Company proposals were discussed but the Union did not agree to either one. In response to the wage proposal, Fleming raised his previous request to form a joint compensation task force and to consider a wage reopener, the Company indicated that its wage scale proposal was based on a marketing study performed by a consulting firm. No agreement was reached at this meeting. With respect to the proposed health care changes, Fleming proposed moving all unit employees to the BCN plan and maintaining the same level of benefits and premium

[35] Id., p. 3.
[36] GC Exh. 18. Id., p. 2.
[37] GC Exhs. 19–20.
[38] GC Exh. 21.
[39] GC Exh. 22.
[40] GC Exh. 23.

amounts. Reuter rejected that proposal, but never told Fleming that BCN would not agree to provide the Company with separate plans.[41]

The Company submitted a new wage proposal on September 25, and a new provision permitting it to offer hours to on-call, non-unit employees, before offering overtime work to unit employees. The Union rejected that proposal and the Company agreed to review it and generate a new one. The Union also proposed "concepts" for consideration and reiterated its objection to the Company's announced unilateral changes to unit employees' health care.[42]

On October 1, the Company implemented the changes to its healthcare plan. Changes included an increase in the amount employees would have to pay for services such as MRI's, physical therapy, and emergency room visits from a $150 copay to, for someone with a family plan, being required to pay $2000 out of pocket before benefits would kick in. The amount of money employees had to pay out of their checks for healthcare premiums also increased significantly, as noted above.[43]

The Company's wage proposal, which disappeared on September 25, reappeared in Reuter's October 18 proposal in response to a union information request.[44]

F. Union Requests for Information

On October 23, Fleming requested a copy of the marketing study relating to wage and overtime cost issues mentioned by the Company by October 30:[45]

1) A copy of the market study and any associated documents regarding the classifications covered by the collective bargaining agreement that was used as a basis for your proposals on 9/18/12 & 9/25/12.

2) Management has consistently argued the market study was part of a larger effort to bring all classifications' salary in line with the market. Management has also stated at least a portion of their proposals are based on economics. A copy of the market study and any associated documents regarding classifications outside of the collective bargaining agreement.

[41] I credit Fleming's credible testimony regarding statements made by Reuter and other Company officials during bargaining. (Tr. 79–83, 125, 275–276.) Reuter did not credibly refute his testimony as to whether BCN would provide other health care options and she seemed evasive on the issue of a marketing study, insisting that the Company's position was based on an email from Canum earlier that day in which he included a 2-percent increase, but reduced the number of steps. (Tr. 165–167; R. Exh.1.)

[42] While Fleming objected to the Company's unilateral changes to unit employees' health care coverage, it is clear that he was flexible to moving their coverage over to BCN. (GC Exhs. 24–25; Tr. 83–85.)

[43] GC Exh. 19.

[44] GC Exh. 26.

[45] Fleming testified that he requested the information within a week because he was going on vacation for several weeks in November. (Tr. 94.) However, he did not mention that in the information request. (GC Exh. 27.)

3) The amount of overtime bargaining unit members earned over the past twelve (12) months.

4) The estimated savings for management's proposal to offer hours to on-call staff before giving bargaining unit employees overtime.

5) The number of bargaining unit members who selected BCN Core and BCN Buy-Up for single, double and family [coverage].

Reuter did not respond, however, until November 27, when she informed Fleming that she did not forget about the request and a response would be forthcoming within a week. She also acknowledged the existence of the requested "marketing study" by explaining that she was "working through some licensing issues" relating to the request for that document.[46]

On December 5, Reuter finally responded to the October 23 information request. She did not deny the relevance or the existence of the requested information, which was based on Fleming's recollection of Company representations at the September 18 and 25 meetings.[47] Instead, Reuter denied the request for marketing study information and omitting any overtime information:

> BHS objects to this request because it seeks information that is confidential, covered by an End-User Licensing Agreement with ERI Economic Research Institute. Inc., and PAQ Services, Inc., is irrelevant, and is privileged under the *Berbiglia* work product privilege. Subject to and without waiving its objections, BHS did not conduct a "market study" and has no market study to produce. The compensation analysis that we have discussed during bargaining is a small part of [a] much bigger project that is only in the beginning stages and is not yet complete. The wage proposal that was part of Option C and provided to the Union on September 18[,] 2012, was based on wage information pulled from a database that is subject to the licensing agreement referenced above. The Union may wish to visit ERI's website t[o] obtain additional information about the databases that are available for a cost and subject to a licensing agreement. http://www/erierj.com/. Moreover, the Union's response to the wage proposal was "Hell No," and this proposal has since been withdrawn.[48]

With respect to the Union's request for a copy of the marketing study and any "associated documents regarding classifications outside of the collective bargaining agreement," Reuter responded as follows:

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[46] Reuter testified that she forwarded the request to Human Resources Director Lisa Greene, in accordance with her usual and customary practice. (Tr. 129–130: GC Exh. 27.) As to what Greene did, if anything, with the request thereafter is unknown since she did not testify and there is no documentation explaining what her role was in obtaining the requested information. (GC Exh. 27.)

[47] In addition to my previous credibility determination, the Company's response to Fleming's information request confirms his recollection of the Company's representations during the September 18 and 25 bargaining sessions. (Tr. 93–94.)

[48] GC Exh. 28; R. Exh. 2.

> BHS objects to this request because it seeks information that is confidential, covered by a licensing agreement, is irrelevant, and is privileged under the *Berbiglia* work product privilege. There is no information regarding classifications outside of the collective bargaining agreement that formed the basis for the wage proposal provided to the Union on September 18, 2012. Moreover, the Union's response to the wage proposal was "Hell No," and this proposal has since been withdrawn.[49]

With respect to the licensing agreement referred to in Fleming's information request and the Reuter's response, Reuter was referring to a wage database generated for the Company by ERI Economic Research Institute (ERI) and PAQ Services, Inc. in or around October 2012.[50] In fact, Stephen Canum, the Company's director of business services, generated a spread sheet showing wage progression information as requested by the bargaining committee. In doing so, he accessed the ERI database.[51] As such, Reuter, McLincha, and/or other Company representatives knowingly relied on the ERI wage database when they offered their wage proposals on September 18 and 25. Yet, they did not propose to provide alternative information or enter into a confidentiality agreement that would permit it to show such information to the Union.[52]

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[49] Id. at 2.

[50] McLincha's testimony denying the Company's ability to access the ESI database was not credible. She testified the Company hired a compensation consultant, Deb Volt, in September 2012, to train a newly hired computer analyst, Josh Gauthier, to operate the ERI database. Gauthier, however, was terminated on May 1, 2013 for performance and behavioral reasons. Incredibly, McLincha insisted that Gauthier, a relatively inexperienced employee, was given exclusive access to the ERI database and no one else, including the IT department, knew how to access the information. (Tr. 216–219.) However, her explanation did not preclude Gauthier, who was not terminated until May 2013, from providing her, Canum, and the bargaining team with the database information when the Union sought such information in 2012. Moreover, McLincha conceded on cross-examination that the Company knew that it could enter into another user agreement with the ERI that would enable it to access the ERI database information and was only then, at the time of trial, planning to use it. (Tr. 248–251, 253–255.)

[51] Canum's testimony lacked credibility. He too denied the existence of a marketing study, insisted that he generated his report based solely on "progression wage information," and did not access any external or internal database. (Tr. 209–211; R. Exh. 1; GC Exh. 27.) On cross-examination, however, he conceded accessing the Company's payroll database. Canum also alluded to other "versions" that he "costed out," but then attempted to backtrack as to whether he even did them, insisting he could not recall even doing this one. (Tr. 212–214.)

[52] Reuter offered conflicting, shifting, and less than credible testimony regarding the Company's access to the ERI wage database. Reuter testified that she asked McLincha for a copy of the licensing agreement and McLincha complied. (Tr. 131, 137–139; R. Exh. 2.) McLincha, however, denied receiving such a request from Reuter. (Tr. 248.) Moreover, Reuter testified that the Company neither accessed nor based any of its wage proposals on the ERI wage database, insisted that the proposal to eliminate several wage scale steps emanated from information received from an employers' association, and that she provided the Union with the licensing information because Respondent had the "intention of conducting a market study." (Tr. 138, 142, 166, 169.) She also disavowed her prior sworn statement in an affidavit to an NLRB investigator that the Company reviewed "a database, the average age for a worker, and the geographical location to see if the wages we were offering were competitive." She

With respect to the overtime information requested in item 3, Reuter stated that the Company was waiting for a payroll report covering the recently completed fiscal year and would provide the information by December 7.[53] The information was accessible and was available for production prior to December 7. Reuter did not, however, provide the requested overtime information until December 24.[54]

With respect to item 4—the claimed savings by using on-call employees instead of overtime work—Reuter said there were no documents to support such a claim. However, she asserted that cost savings could be "gleaned from the overtime report and the knowledge that overtime is offered to union employees before the use of on-call staff who would not work overtime hours."[55]

As to item 5, the Company provided the requested information as to the number of unit employees who selected particular BCN plans. No explanation was provided as to why it took until December 5 to provide enrollment information that was complete prior to October 1.[56]

LEGAL ANALYSIS

I. UNILATERAL CHANGE TO HEALTH CARE INSURANCE

The General Counsel contends that the Company unlawfully unilaterally changed its health care provider without affording the union a good-faith opportunity to bargain over this change, and therefore, violated Section 8(a)(5). The Company denies these allegations and maintains that at all times it bargained in good faith and was, indeed, obligated to unilaterally change health care providers in order to maintain the status quo under the expired CBA.

As a general rule, an employer violates its duty to bargain in good faith if it makes unilateral changes to mandatory terms and conditions of employment without prior notice and a meaningful opportunity to bargain. *NLRB v. Katz*, 369 U.S. 736, 743 (1962). Such a rule, as applied to circumstances when the parties are engaged in negotiations, means that an employer is obligated to maintain terms and conditions of employment that existed under the expired agreement. As such, the employer may not undertake unilateral changes unless and until the parties reach a lawful impasse, absent a showing that the union has engaged in delay tactics or the employer is facing economic exigencies. *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 198–199 (1991). *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991). The rationale for this rule is that if the employer is free to alter the very terms and conditions subject to the negotiations, bargaining would become difficult. *Litton*, supra at 198.

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conceded, however, that the Company did have access to one during the period of time that the Union sought the subject information. (Tr. 171, 175, 197–198).

[53] GC Exh. 28 at 2.

[54] Reuter conceded that the employee wage database, which was generated and maintained by ERI. (Tr. 176; GC Exh. 29.)

[55] Reuter also conceded that there were no documents to support the claimed savings. (GC Exh. 28 at 2; Tr. 98–99, 176–177.)

[56] Reuter acknowledged that there was no valid explanation for the delay. (Tr. 99.)

It is undisputed that the Company unilaterally changed unit employees' health care coverage, a term and condition of employment, on August 28. The Company did not implement this change based on the belief that an impasse was reached, the Union was engaging in dilatory tactics, or economic exigencies. It made the change on the premise that it was obligated to do so because of its obligation to maintain the status quo under the CBA by offering unit employees the same health insurance options available to nonunit employees.

Both parties premise their legal argument on the Board's decision in *Finley Hospital*, 359 NLRB No. 9, slip op. at 2 (2012). In *Finley*, an employer failed to adjust employees' wages on their anniversary dates, as required by the collective-bargaining agreement, after it expired. The Board held that, in the absence of a contractual provision to the contrary, the statutory obligation to maintain the status quo with respect to wages did not expire along with the agreement. Accordingly, the employer was still obligated to award wage increases on employees' anniversary dates. Id. at 27.

The Company concedes that the parties' "me-too" provision expired along with the CBA, but interprets the status quo as statutorily obligating it to provide the same health care to unit employees as it does to nonunion employees. In arriving at this interpretation, the Company notes that in *Finley*, as in this case, the expired agreement, which also contained a me-too provision, was silent as to what would happen to the employee benefit at issue[57] upon expiration of the agreement. Because of this silence, the provision, according to the Company, is still in effect. Conversely, the General Counsel contends that the Company must maintain the health care plans available to unit employees at the time the CBA expired in order to preserve the status quo as of October 1, 2012.

During negotiations for a new agreement, an employer may be obligated to make changes in employees' terms and conditions of employment, when those changes are an established part of the status quo, but "the corollary to this rule . . . is that an employer must always bargain over the discretionary aspect of the change in question." *Alan Ritchey, Inc.,* 359 NLRB No. 40, slip op. at 5 (2012) citing *Oneita Knitting Mills, Inc.,* 205 NLRB 500 (1973) (finding that an employer violated the Act by failing to negotiate over the discretionary aspects of a merit raise program). The Company's recognition of the fact that there is no discretionary status quo is simply inconsistent with the belief that it was entitled to unilaterally exercise its discretion to require unit employees to choose from the same health plans as nonunion employees. The record demonstrates that the Company had several health insurance choices available to it, but used its discretion to limit the ones available to all employees, including unit employees.

In the instant case, the "me-too" provision is discretionary and, by its terms, unrelated to the Company's obligation to provide unit employees with the same insurance as non-union employees. The "me-too" provision is a contractual provision, which is not statutory, while health coverage constitutes a term and condition of employment, and is a statutory provision. *Litton*, supra at 206; *Finley*, supra at 3. Furthermore, the status quo of unit employees as of the expiration of the contract is whatever health coverage they had in effect at the expiration of the

[57] *Finley* involved annual wage increases, while our case involves annual renewal of health care benefits.

agreement. See *Finley*, supra at 3. As such, the Company was not entitled to unilaterally change them without bargaining.

Lastly, the Company does not assert that its unilateral changes to unit employees' health care were related in any way to delay tactics by the union, privilege based on past practice or economic exigencies faced by the company. In any event, these arguments do not apply to this case. There is no contention of bargaining delays by either side. With respect to a past practice defense, an employer must show that the practice occurred with such regularity and frequency that employees could reasonably expect the practice to continue or reoccur on a regular and consistent basis. *Caterpillar, Inc.,* 355 NLRB 535, 537 (2010). The Company made changes pursuant to the "me-too" provision only once, in 2010. A single instance is insufficient to establish a past practice. *McGraw-Hill Broadcasting Co.*, 355 NLRB 1297 fn.10 (2012). In order to establish economic exigency as a defense, an employer must show that the exigency was caused by external events, beyond the employer's control. *RBE Electronics of S.D.*, 320 NLRB 80, 81 (1995). McLincha explained that health care plan premiums were poised to increase substantially. She insisted that the increased costs essentially limited the options available to the Company and unit employees. As a practical matter, she may have been correct, but the record evidence demonstrated that the Company was provided with renewal quotes by Priority Health and BCN. The Company unilaterally ruled out renewing with Priority Health and inquiring with BCN as to whether it would provide an option for unit employees only. Accordingly, the Company's decision to unilaterally change health care providers was a discretionary one, rather than a decision forced by external events.

Based on the aforementioned unilateral changes to unit employees' health care after the expiration of the me-too provision, the Company violated Section 8(a)(5) and (1) of the Act.

II. INFORMATION REQUESTS

The General Counsel also charges that the Company failed to provide relevant information to the Union and unreasonably delayed in providing information the Union requested on October 23, 2012. The Company denies the allegations, insisting that under the totality of the circumstances it did not unreasonably delay in responding to the request, and further, some of the information does not exist, and thus, cannot be provided.

It is well established that employers have a duty to furnish relevant information to a union representative during contract negotiations. *NLRB v. Truitt Mfg. Co.,* 351 U.S. 149 (1956). The Board requires the employer to respond to the request in good faith and as promptly as the circumstances will allow. *West Penn Power Co.,* 339 NLRB 585, 587 (2003), enfd. in pertinent part 394 F.3d 233 (4th Cir. 2005). In evaluating the promptness of a response the Board will consider the totality of the circumstances including the complexity, extent of the information sought, its availability, and the difficulty in retrieving the information. Id. at 587. When information "has been demonstrated to be relevant, the burden shifts to the respondent to establish that the information is not relevant, does not exist, or for some other valid and acceptable reason cannot be furnished to the requesting party." *House of Good Samaritan Medical Center*, 319 NLRB 392, 397, (1995).

On October 23, the Union requested wage and health insurance information, all mandatory subjects of bargaining. The request included a market study, which was mentioned by the Company during negotiations as the basis for its wage proposals of September 18 and 25. The Union requested the information by October 30, but the Company ignored the request until it communicated on November 27 that a response would be forthcoming. A partial response was provided on December 5, approximately 6 weeks later, and supplemented on December 24, over 2 months later.

A. Denied Information Request

In her December 5 response, Reuter, the Company's lead negotiator confirmed her previous statements as to the existence of a market study, but denied production based on relevance**,** privilege, and a confidentiality agreement with a wage database software company. At trial, for the first time, Reuter shifted position, explained she was mistaken and insisted the market study never existed. She conceded, however, that she was referring at all times to the ERI wage database that was referred to in the license agreement provided to the Union in support of its privilege and confidentiality claim. Putting aside the absurdity of such an explanation, the failure to simply inform the Union that the market study mentioned during negotiations *was* the ERI wage database was misleading at best, bad faith at worst.

The Company's evasiveness in responding to the request for such information became even more evident when McLincha explained that exclusive maintenance of the ERI wage database information was delegated to an employee who was being trained by a consultant. McLincha was unable to access the ERI wage database information on his computer, as he was terminated in May 2013 for "performance and behavioral reasons." She failed to explain, however, why the Company would not have secured access to his computer information before letting him go. In any event, McLincha conceded on cross-examination that the ERI wage database information could be accessed by simply entering into another license agreement with ERI—something that the Company was only now in process of doing.

The Company also alluded to the fact that the September 18 proposal was subsequently withdrawn. However, unit employees' wages were still being negotiated. Having identified the existence of market study as a source of information relevant to the issue of unit employees' wages, therefore, the Union was entitled to it. See *Mary Thompson Hospital*, 296 NLRB 1245, 1250 (1989), enfd. 943 F.2d 741 (7th Cir. 1991) (conclusion of a grievance proceeding does not moot the union's entitlement to information).

Based on the foregoing, it is clear that the market study exists, at the very least, in the form of the ERI wage database maintained on a Company computer. The information on the wage database, which was relied on by Company representatives during collective-bargaining negotiations on September 18 and 25, is relevant to the parties' negotiations over the wage provisions in a successor CBA.

With respect to the Company's concerns over confidentiality of its licensing agreement with ERI and PAQ, it could have insisted on a confidentiality agreement limiting production to the Union's lead representative and/or his labor counsel. Instead, as explained above, the

Company chose to allude to the information, but then denied access to it based on a confidentiality privilege and, finally, denied that it existed. See *Alcan Rolled Products–Ravenswood, LLC.*, 358 NLRB No. 11, slip op. at 9 (2012). Accordingly, the Company's failure to provide the Union with a copy of the ERI wage database violated Section 8(a)(5) and (1).

B. Delayed Information Request

The Company provided responses to information requests regarding employees' health care plan enrollment on December 5, and overtime reports on December 24. It conceded there was no reason why such information could not have been provided earlier, but contends that any delay was de minimis and the Union was not prejudiced. Moreover, the Company argues Fleming neither provided an explanation as to why he needed the information by October 30, nor submitted follow up requests for the information.

Under the circumstances, most particularly, the failure to provide any explanation, the Company unreasonably delayed in taking 6 weeks to respond to the Union's request for information regarding unit employees' overtime reports, and 2 months to provide requested health plan enrollment information. See e.g., *Bundy Corp.*, 292 NLRB 671 (1989) (6-week delay unreasonable); *Bituminous Roadways of Colorado*, 314 NLRB 1010 (1994) (5-week delay unreasonable); *Postal Service*, 332 NLRB 635 (2000) (3-week delay unreasonable).

The fact that the Union did not follow-up to remind the Company about the information requests is inconsequential. *International Protective Service,* 339 NLRB 701, 704 (2003) (union is under no obligation to follow-up). The only issue is whether the Union is entitled to the information *at the time it makes its request* and, unless the employer has a valid defense, the employer must promptly hand over the information. *Woodland Clinic*, 331 NLRB 735, 737 (2000) (emphasis added).

CONCLUSIONS OF LAW

(1) The Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

(2) The Union is a labor organization within the meaning of Section 2(5) of the Act.

(3) The Company violated Section 8(a)(5) and (1) by unilaterally changing unit employees' health coverage without giving the Union an opportunity to bargain over the changes;

(4) The Company further violated Section 8(a)(5) and (1) by failing and refusing to provide, and then unreasonably delaying in providing, information requested on October 23, 2012, which was relevant to the Union's obligations as the labor representative of unit employees.

(5) The aforementioned unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Company has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[58]

ORDER

Hope Network Behavioral Health Services, a wholly owned subsidiary of Hope Network Respondent, Grand Rapids, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to provide information to the Union, when that information is requested by the Union and is relevant to its duties as the collective-bargaining representative of unit employees.

(b) Unreasonably delaying in providing information to the Union, when that information is requested by the Union and is relevant to its duties as the collective-bargaining representative of unit employees.

(c) Unilaterally changing unit employee health insurance plans.

(d) Otherwise make changes to unit employee's terms and conditions of employment without first bargaining to good-faith impasse with the Union.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Provide the Union with information concerning any market studies used in formulating the Company's wage proposals, and information concerning any cost savings the Company may realize from its bargaining proposals concerning a new on-call policy.

[58] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Restore all of the terms and conditions of employment as they existed prior to October 1, 2012.

(c) Make unit employees whole for any losses suffered as a result of the changes made by the Company to their health insurance plan on October 1, 2012.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Grand Rapids, Michigan, copies of the attached notice marked "Appendix."[59] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to [employees] [members] [employees and members] are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 1, 2012.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. July 11, 2013

_____

Michael A. Rosas
Administrative Law Judge

[59] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to bargain collectively and in good faith with Local 459, Office Professional Employees International Union, AFL–CIO (the Union), as the exclusive collective-bargaining representative of our employees in the following unit:

All full-time and regular part-time advanced Kalamazoo crisis specialists, advanced residential inspectors, cooks, day program instructors, dietary aides, grounds maintenance technicians, health and activity coordinators, housekeepers, Kalamazoo crisis stabilization specialists, Kalamazoo dietary coordinators, Kalamazoo elderly program residential care staff, lead cooks, licensed practical nurses (LPNs), maintenance technicians and flooring and tile specialists, medical assistants, Muskegon residential care staff, overnight relief, painters, residential instructors, and transitional health specialists; but excluding the following: on call employees (Status 9), temporary employees, per diem employees, contract employees, administrative employees, clerical employees, managerial employees, confidential employees, consumer employees, and supervisors (Assistant Program Managers, Program Managers, Program Directors, Resident Managers, Resident Assistants, Nursing Supervisor–RNs, Program/Nursing Manager, Shift Supervisors–LPN, Director of Dietary Services, Program/Activities Manager, and Lead Residential Instructors), professional employees (Program Nurse–RNs, Kalamazoo Crisis RNs, Case Managers, Behavioral Specialists, Therapists) and guards as defined in the Act.

WE WILL NOT fail and refuse to provide information to the Union, when that information is requested by the Union and is relevant to its duties as the collective-bargaining representative of our employees.

WE WILL NOT unreasonably delay in providing information to the Union, when that information is requested by the Union and is relevant to its duties as the collective-bargaining representative of our employees.

WE WILL NOT unilaterally change unit employee health insurance plans.

WE WILL NOT otherwise make changes to your terms and conditions of employment without first bargaining to good-faith impasse with your Union.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed them in Section 7 of the National Labor Relations Act.

WE WILL provide the Union with information concerning any market studies we used in formulating our wage proposals, and information concerning any cost savings we may realize from our bargaining proposals concerning a new on-call policy.

WE WILL restore all of your terms and conditions of employment as they existed prior to October 1, 2012.

WE WILL make you whole for any losses you suffered as a result of the changes we made to your health insurance plan on October 1, 2012.

HOPE NETWORK BEHAVIORAL HEALTH SERVICES, a wholly owned subsidiary of HOPE NETWORK

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

477 Michigan Avenue, Room 300, Detroit, MI 48226-2543

(313) 226-3200, Hours: 8:15 a.m. to 4:45 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (313) 226-3244.